APPENDIX.

(1923 American Maritime Cases, 959.)

COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO, EIGHTH DISTRICT, JULY 23, 1923. AT LAW.

KELLY ISLAND LIME AND TRANSPORT COMPANY, *Plaintiff-in-Error,*

vs.

COMMERCIAL ASSURANCE COMPANY, LTD., *Defendant-in-Error.*

MIDDLETON, *P. J.:*

The plaintiff in error, The Kelly Island Lime & Transport Company, in 1916 insured the barge Norman Kelly with the defendant in error, Commercial Union Assurance Company, Ltd., of London, England. This insurance contract had a collision coverage provision in it which read as follows:

> "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the Assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding * * * we, the Assurers, will pay the Assured such proportion of such sum or sums so paid."

On November 26, 1916, the barge aforesaid, while in tow of the tug *W. B. Sanders,* which was also owned by the Transport Company, collided with the steamer Breitung at the mouth of the Cuyahoga River. By reason of this collision both the barge and the steamer were damaged. Thereafter the owner of the steamer Breitung brought an action in the District Court of the United States for the Northern District of Ohio, in Admiralty against the tug Sanders and the barge Kelly. That court found and held that the collision aforesaid was due to the sole negligence of the tug Sanders and adjudged that the Transport Company, as the owner of said tug, should pay to the owner of the steamer Breitung the sum of $3,369.34, which amount was subse-

quently paid by said Transport Company. It further appears from the record that many other insurance companies had contracts of insurance covering the barge Kelly at the time of said collision, and that the Transport Company in this action seeks only to recover from the Assurance Company its proportionate share of the amount so paid to the owner of the Breitung and of the costs of repainting the barge Kelly.

The Assurance Company denies all liability under said contract of insurance. It maintains, first, that under the provisions of the collision clause aforesaid it is not liable to reimburse the owner of the tug Sanders for any sum it may have paid for damage to the Breitung * * *.

The Court of Common Pleas found in favor of the Assurance Company on its claim of non-liability for any damage done to the steamer Breitung, * * * Both companies are here by petitions in error asking for a reversal of the judgment of the lower court.

* * * * * * *

Coming now to consider the claim of the Transport Company that by the provisions of the collision clause aforesaid the Assurance Company is bound to pay the claim of the Breitung, it is manifest that under the provisions of said clause two facts must be established to support such claim of liability. They are:

First: That the barge Kelly must come into collision with another ship; and

Second: In consequence of said collision the assured shall become liable to pay, by way of damages, some other person or persons.

The fact of the collision is admitted. But did the facts adduced in evidence warrant the conclusion that by reason of said collision the assured became liable to pay, by way of damages, etc., the amount aforesaid? The liability as a result of such collision must be such a liability as would permit the third person or persons to recover in a suit at law for the damage done. In other words, when the parties made this contract it must be assumed that both understood

and intended that when the assured became liable by reason of a collision it must be such a liability, and only such, as could be enforced in a court of law against the assured. It necessarily follows from this that under the facts in the instant case if some party other than the assured had owned the Sanders no claim of the assured could be made under this clause of the contract against the Assurance Company. These facts lead to the further conclusion that by the provisions of the contract in question the parties must have contemplated that a basis for the liability of the assured to pay there must be, in some degree at least, a responsibility on the part of the barge for the collision. Unless the collision occurred by the fault of the barge, and such fault was either a proximate or contributing cause of the collision, there could be no liability on the part of the Transport Company in its capacity as owner of the barge to pay any third person for any damage resulting from said collision. So that it may be said that woven into this provision in respect to liability, and as a necessary part or element thereof, is a further legal responsibility on the part of the barge for the collision. This is not only the natural effect of the language used but, in our judgment, is the necessary legal effect of such language. We can not conceive that such language imports that the assured in any capacity other than that as the owner of the barge was intended by the parties to be indemnified against the claims of third persons from a collision in which the barge might be involved. We are unable to adopt the view that this clause of the contract furnishes any indemnity to the assured other than that which covers its transactions as owner of the barge. Now, as before observed, the barge had been absolved by the decree of the Federal Court from any responsibility in connection with the collision. Not only has it been thus relieved from liability, but that court has found further that the tug Sanders was the sole cause of the collision and the Transport Company as the owner of the tug, not as the owner of the barge, was adjudged to pay the resulting damage to the Breitung. These facts, in our judgment, relieve the Assurance Company from any liability under said collision clause. Our conclusion in this respect is further fortified by the

fact that as a general proposition of law it must be assumed that the contract involved here was made in conformity with the established doctrines of maritime law. This law regards a ship as a distinct entity and liable for its acts without reference to its owners. When the contract was made it doubtless was intended by the parties thereto that the barge as an independent entity might involve liability on the part of the Assurance Company when the owners of said barge would in no wise be responsible. This being so, it was also doubtless contemplated by the parties that the only indemnity contracted for by the owners was in the capacity of owners of said barge and not as owners of some other ship.

In view of these considerations, we conclude that the judgment of the lower court should be affirmed.

Judgment affirmed.

Mauck, J., and Sayre, J., concur.

Hull policy on barge Tex # 2

HULL POLICY
(Broad Form)

No. IMH 450678

STOCK COMPANY

Marine Department

National Union Fire Insurance Company
Pittsburgh, Pa.

By this Policy Insures E. EGGERS

On account of HIMSELF

In case of loss, to be paid in funds current in the United States to E.EGGERS AND GULFPORT BOILER & WELDING WORKS, INC., as their respective interests may appear.

Does make Insurance and cause As per form attached

To be insured As per form attached

AS PER FORM ATTACHED

American Institute
TIME (HULLS)
April 1, 1936

- E.EGGERS -

FOR ACCOUNT OF HIMSELF

but subject to the provisions of this Policy with respect to change of ownership.

"NEW OWNERSHIP" Should the Vessel be sold or transferred to other ownership, then, unless the Underwriters agree in writing to such sale or transfer, this Policy shall thereupon become cancelled from date of sale or transfer, unless the Vessel has cargo on board and has already sailed from her loading port, or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A pro rata daily return of net premium shall be made. The foregoing provisions with respect to cancellation in the event of sale or change of ownership shall apply even in the case of insurance "for account of whom it may concern".

Loss, if any, payable to E.EGGERS AND GULFPORT BOILER & WELDING WORKS, INC., as their respective interests may appear or order.

In the sum of SEVENTEEN THOUSAND FIVE HUNDRED & NO/100 ($17,500.-) - - - - Dollars,

at and from the 1st day of JULY 1937 } beginning and ending with NOON
to the 1st day of JULY 1938 } CENTRAL STANDARD time.

Provided, however, should the Vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium to her port of destination.

On the NEW STEEL ~~HULL~~ BARGE "TEXAS NO.2"

(or by whatsoever name or names the said Vessel is or shall be called).

The said Vessel, for so much as concerns the Assured, by agreement between the Assured and Underwriters in this Policy, is and shall be valued at as follows:

Hull, tackle, apparel, passenger fittings, equipment, stores, ordnance, munitions, boats and other furniture . . . . . $XXXXXX

Boilers, machinery, refrigerating machinery and insulation, and everything connected therewith . . . . . $XXXXXX $17,500.-

Donkey boilers, winches, cranes, windlasses, steering gear and electric light apparatus shall be deemed to be a part of the hull and not of the machinery.

The Underwriters to be paid in consideration of this insurance THREE HUNDRED EIGHTY-SIX & 40/100 - Dollars being at the rate of 2.208 - - - per cent.

In event of non-payment of premium thirty days after attachment this Policy may be cancelled by the Underwriters upon five days written notice being given the Assured. Either party may cancel this Policy on Thirty days' notice.

Cancelled

To return

14.72 cents per cent. net for each uncommenced month if ~~to be mutually agreed to cancel this Policy.~~ As follows for each consecutive 30 days the Vessel may be laid up in port, viz.:—

XXXX cents per cent. net if in the United States not under repair.

XXXX cents per cent. net under repair or outside the United States. and arrival.

Provided always: (a) that in no case shall a return be allowed when the within named Vessel is lying in a roadstead or in exposed and unprotected waters.

(b) that in the event of a return for special trade, or any other reason, being recoverable, the above

To return) XXXX cents per cent. net if in the United States not under repair. XXXX cents per cent. net under repair or outside the United States. Provided always: (a) that in no case shall a return be allowed when the within named Vessel is lying in a roadstead or in exposed and unprotected waters. (b) that in the event of a return for special trade, or any other reason, being recoverable, the above rates of return of premium shall be reduced accordingly. (and arrival.

In the event of the Vessel being laid up in port for a period of 30 consecutive days, a part only of which attaches to this Policy, it is hereby agreed that the laying up period, in which either the commencing or ending date of this Policy falls, shall be deemed to run from the first day on which the Vessel is laid up and that on this basis Underwriters shall pay such proportion of the return due in respect of a full period of 30 days as the number of days attaching thereto bear to thirty.

BEGINNING THE ADVENTURE upon the said Vessel, as above, and so shall continue and endure during the period aforesaid, as employment may offer, in port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam, motor power or sail; with leave to sail or navigate with or without pilots, to go on trial trips and to assist and tow vessels or craft in distress, but if without the approval of Underwriters the Vessel be towed, except as is customary or when in need of assistance, or undertakes towage or salvage services under a pre-arranged contract made by Owners and/or Charterers, the Assured shall pay an additional premium if required by the Underwriters but no such premium shall be required for customary towage by the Vessel in connection with loading and discharging. With liberty to discharge, exchange and take on board goods, specie, passengers and stores, wherever the Vessel may call at or proceed to, and with liberty to carry goods, live cattle, &c., on deck or otherwise. Including all risks of docking, undocking, changing docks, or moving in harbor and going on or off gridiron or graving dock as often as may be done during the currency of this Policy.

But Warranted as follows:-

AS PER FORM ATTACH

AS PER FORM ATTACH

INLAND MARINE DEPARTMENT

ENDORSEMENT

NEW STEEL OIL BARGE "TEXAS NO.2"

1. Warranted confined to the use and navigation of Inland navigable waters of Texas and Louisiana.

2. Privilege to transport oil in bulk, but warranted by Assured no gasoline cargoes will be carried.

3. It is understood and agreed that no right of subrogation shall exist against any vessel owned in whole or in part or chartered by the Assured on the bareboat basis.

2. Privilege to transport oil in bulk, but warranted by Assured no gasoline cargoes will be carried.

3. It is understood and agreed that no right of subrogation shall exist against any vessel owned in whole or in part or chartered by the Assured on the bareboat basis.

4. The Franchise Clause is hereby deleted from Policy and the following is substituted:

> "The sum of One Hundred ($100.-) Dollars shall be deducted on all claims under this Policy, except in cases of total and/or constructive total loss there shall be no deduction."

5. Warranted that molasses will not be carried in this barge during currency of this policy.

6. No cargo, liquid, or otherwise, shall be carried in either rake end or the collision compartments of the barge.

7. Privilege is granted to charter vessel insured on bareboat basis or otherwise, provided notice is given to Underwriters as soon as is practicable.

8. Warranted that the four cylinder 80 Horsepower Caterpillar Engine and Kinney Pump shall be bolted to the deck of the barge.

. . . . .

7. Privilege is granted to charter vessel insured on bareboat basis or otherwise, provided notice is given to Underwriters as soon as is practicable.

8. Warranted that the four cylinder 80 Horsepower Caterpillar Engine and Kinney Pump shall be bolted to the deck of the barge.

All other terms, conditions, limitations and valuations remaining unchanged.

Attached to and forming part of Policy No. IMH 450678 issued by THE NATIONAL UNION Fire Insurance Company of Pittsburgh, Pa. to E. EGGERS

E. T. BARROW & CO., INC., GENERAL AGENTS

Date July 1st 1937. By [signature] Agent.

"NOTICE OF ACCIDENT AND SURVEY"

In the event of accident whereby loss or damage may result in a claim under this Policy, notice shall be given in writing to the Underwriters, where practicable, prior to survey, so that they may appoint their own surveyor if they so desire. The Underwriters shall be entitled to decide the port to which a damaged Vessel shall proceed for docking or repairing (the actual additional expense of the voyage arising from compliance with Underwriters' requirements being refunded to the Assured) and Underwriters shall also have a right of veto in connection with the place of repair or repairing firm proposed and whenever the extent of the damage is ascertainable the majority (in amount) of the Underwriters may take or may require to be taken tenders for the repair of such damage.

In cases where a tender is accepted with the approval of Underwriters, an allowance shall be made at the rate of 30 per cent. per annum on the insured value for each day or part thereof from the time of the completion of the survey until the acceptance of the tender provided that it be accepted without delay after receipt of Underwriters' approval.

No allowance shall be made for any time during which the Vessel is loading or discharging cargo or bunkering or taking in fuel.

Due credit shall be given against the allowance as above for any amount recovered:—

(a) in respect of fuel and stores and wages and maintenance of the Master, Officers and Crew or any member thereof allowed in General or Particular Average;

(b) from third parties in respect of damages for detention and/or loss of profit and/or running expenses;

for the period covered by the tender allowance or any part thereof.

In the event of failure to comply with the conditions of this clause 15 per cent. shall be deducted from the amount of the ascertained claim.

"15% DISBTS. WARRANTY"

Warranted that the amount insured for account of the Assured and/or their managers on Disbursements, Commissions and/or similar interests, "policy proof of interest" or "full interest admitted" or on excess or increased value of Hull or Machinery, however described, shall not, except as indicated below, exceed 15 per cent. of the insured valuation of the Vessel, but the Assured may in addition thereto effect "policy proof of interest" or "full interest admitted" insurance on any of the following interests:

(a) Premiums (reducing or not reducing monthly) to any amount actually at risk, and

(b) Freight and/or Chartered Freight and/or Anticipated Freight and/or Earnings and/or Hire or Profits on Time Charter and/or Charter for series of voyages for any amount not exceeding in the aggregate 25 per cent. of the insured valuation of the Vessel; and if the actual amount at risk on any or all of such interests shall exceed such 25 per cent. of the insured valuation of the Vessel, the Assured and/or their managers may, without prejudice to this warranty, insure whilst at risk the excess of such interests reducing as earned, and

(c) Risks excluded by the "F. C. & S. Clause", and

(d) Loss or damage in consequence of strikes, lockouts, political or labor disturbances, civil commotions, riots, rebellions, revolutions, civil war, martial law, military or usurped power or malicious act.

Provided always that a breach of this warranty shall not afford the Underwriters any defense to a claim by mortgagees or other third parties who may have accepted this Policy without notice of such breach of warranty nor shall it restrict the right of the Assured and/or their managers to insure in addition General Average and/or Salvage Disbursements whilst at risk.

"BREACH OF WARRANTY"

Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing, provided notice be given and any additional premium required be agreed immediately after receipt of advices of breach or proposed breach by Owners.

"ADVENTURES AND PERILS"

Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of

(c) Risks excluded by the "F. C. & S. Clause", and

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"ADVENTURES AND PERILS"

Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, &c., or any part thereof. And in case of any Loss or Misfortune, it shall be lawful for the Assured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said Vessel, &c., or any part thereof, without prejudice to this Insurance, to the Charges whereof the Underwriters will contribute their proportion as provided below. And it is expressly declared and agreed that no acts of the Underwriters or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

"SUE AND LABOR"

"LATENT DEFECT AND NEGLIGENCE"

This insurance also specially to cover (subject to the Average Warranty) loss of or damage to hull or machinery directly caused by the following:—

Accidents in loading, discharging or handling cargo, or in bunkering or in taking in fuel;

Riots;

Explosions on shipboard or elsewhere;

Bursting of boilers, breakage of shafts or any latent defect in the machinery or hull (excluding, however, the cost and expense of repairing or renewing the defective part);

Negligence of Master, Charterers, Mariners, Engineers or Pilots;

provided such loss or damage has not resulted from want of due diligence by the Owners of the Vessel, or any of them, or by the Managers.

Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel.

"SISTER-SHIP SALVAGE"

And it is further agreed that in the event of salvage, towage or other assistance being rendered to the Vessel hereby insured by any Vessel belonging in part or in whole to the same Owners or Charterers, the value of such services (without regard to the common ownership of the Vessels) shall be ascertained by arbitration in the manner below provided for under the Collision Clause, and the amount so awarded so far as applicable to the interest hereby insured shall constitute a charge under this Policy.

"GENERAL AVERAGE"

General Average, Salvage and Special Charges payable as provided in the contract of affreightment, or failing such provision, or there be no contract of affreightment, payable in accordance with the Laws and Usages of the Port of New York. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.

"G. A. & S. LIABILITY"

When the contributory value of the Vessel is greater than the valuation herein the liability of these Underwriters for General Average contribution (except in respect to amount made good to the Vessel) or Salvage shall not exceed that proportion of the total contribution due from the Vessel that the amount insured hereunder bears to the contributory value; and if because of damage for which these Underwriters are liable as Particular Average the value of the Vessel has been reduced for the purpose of contribution, the amount of the Particular Average claim under this Policy shall be deducted from the

"GENERAL AVERAGE"

General Average, Salvage and Special Charges payable as provided in the contract of affreightment, or failing such provision, or there be no contract of affreightment, payable in accordance with the Laws and Usages of the Port of New York. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.

"G. A. & S. LIABILITY"

When the contributory value of the Vessel is greater than the valuation herein the liability of these Underwriters for General Average contribution (except in respect to amount made good to the Vessel) or Salvage shall not exceed that proportion of the total contribution due from the Vessel that the amount insured hereunder bears to the contributory value; and if because of damage for which these Underwriters are liable as Particular Average the value of the Vessel has been reduced for the purpose of contribution, the amount of the Particular Average claim under this Policy shall be deducted from the amount insured hereunder and these Underwriters shall be liable only for the proportion which such net amount bears to the contributory value.

"S. S. C. & S. & L. LIABILITY"

In the event of expenditure for Salvage, Salvage Charges or under the Sue and Labor Clause, this Policy shall only be liable for its share of such proportion of the amount chargeable to the property hereby insured as the insured value, less loss and/or damage, if any, for which the Underwriters are liable bears to the value of the salved property. Provided that where there are no proceeds or there are expenses in excess of the proceeds, the expenses, or the excess of the expenses, as the case may be, shall be apportioned upon the basis of the sound value of the property at the time of the accident and this Policy without any deduction for loss and/or damage shall bear its pro rata share of such expenses or excess of expenses accordingly.

"AVERAGE WARRANTY"

~~Notwithstanding anything herein contained to the contrary, this Policy is warranted free from Particular Average under 3 per cent., or unless amounting to $1,000, but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other Ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expense of righting the vessel after stranding shall be paid if reasonably incurred, even if no damage be found.~~

Grounding in the Panama Canal, Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above a line drawn from the North Basin, Buenos Aires, to the mouth of the San Pedro River) or its tributaries, or in the Danube or Demerara Rivers or on the Yenikale Bar, shall not be deemed to be a stranding.

Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the Average be Particular or General.

No claim shall in any case be allowed in respect of scraping or painting the Vessel's bottom.

"VOYAGE"

~~The warranty and conditions as to Average under 3 per cent. to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods to be selected by the Assured when making up the claim, viz.: at any time at which the Vessel (1) begins to load cargo or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage, if made) or has carried and discharged two cargoes, whichever may first happen, and further as either party, until she begins to load a subsequent cargo or sails in ballast for a loading port. When the Vessel sails in ballast to effect damage repair such sailing shall not be deemed to be sailing for a loading port although she loads at the repairing port. In calculating the 3 per cent. above referred to, Particular Average occurring outside the period covered by this Policy may be added to Particular Average occurring within such period provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding Policy.~~

"CONS'TIVE TOTAL LOSS"

No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.

In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of Total or Constructive Total Loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

"UNREPAIRED DAMAGE"

In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent Total Loss sustained during the

In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of Total or Constructive Total Loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

"UNREPAIRED DAMAGE"

In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent Total Loss sustained during the

term covered by this Policy.

"FULL COLLISION"

And it is further agreed that if the Vessel hereby insured shall come into collision with any other Ship or Vessel and the Assured or the Charterers in consequence thereof or the Surety for either or both of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, we, the Underwriters, will pay the Assured or Charterers such proportion of such sum or sums so paid as our respective subscriptions hereto bear to the value of the Vessel hereby insured, provided always that our liability in respect of any one such collision shall not exceed our proportionate part of the value of the Vessel hereby insured. And in cases where the liability of the Vessel has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the hull and/or machinery, we will also pay a like proportion of the costs which the Assured or Charterers shall thereby incur, or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners or Charterers of one or both of such Vessels becomes limited by law, claims under the Collision Clause shall be settled on the principle of Cross-Liabilities as if the Owners or Charterers of each Vessel had been compelled to pay to the Owners or Charterers of the other of such Vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured or Charterers in consequence of such collision; and it is further agreed that the principles involved in this clause shall apply to the case where both Vessels are the property, in part or in whole, of the same Owners or Charterers, all questions of responsibility and amount of liability as between the two Vessels being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the Managing Owners or Charterers of both Vessels, and one to be appointed by the majority (in amount) of Hull Underwriters interested; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single, or of any two of such three Arbitrators, appointed as above, to be final and binding. Provided always that this clause shall in no case extend to any sum which the Assured or Charterers may become liable to pay or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the cargo or engagements of the Insured Vessel, or for loss of life, or personal injury. And provided also that in the event of any claim being made by Charterers under this clause they shall not be entitled to recover in respect of any liability to which the Owners of the Vessel, if interested in this Policy at the time of the collision in question, would not be subject, nor to a greater extent than the Shipowners would be entitled in such event to recover.

"SISTER-SHIP COLLISION"

"F. C. & S."

Notwithstanding anything herein contained to the contrary, this Policy is warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat (piracy excepted) and also from all consequences of hostilities or war-like operations, whether before or after declaration of war.

The terms and conditions of this form are to be regarded as substituted for those of Policy form to which it is attached, the latter being hereby waived, except provisions required by law to be inserted in the Policy.

Attached to Policy No. IMH 450678 of the THE NATIONAL UNION FIRE INSURANCE CO.

Dated July 1st, 1957

E. T. BARRY & CO., INC., GENERAL AGENTS

By E T Barry

President - Treasurer - Secretary

For Sale by Joseph Lazard, 237 Lafayette St., New York

PRINTED IN U. S. A.

American Institute
TIME (HULLS)

As employment may offer, upon the Body, Tackle, Apparel, Ordinance, Munitions, Artillery, Boat and other Furniture of and in the good NEW STEEL OIL BARGE called the "TEXAS NO.2" or by ship, &c., as above, and shall so continue and endure during the period as foresaid. And it shall be lawful for the said ship, &c., to proceed and sail to and touch and stay at any Ports or Places whatsoever and wheresoever without prejudice to this Insurance. The said ship, &c., for so much as concerns the Assured, by agreement between the Assured and Assurers in this Policy, are and shall be valued as follows:

Hull, Tackle, Apparel and Furniture . . . . . $ AS PER FORM ATTACHED

Machinery and Boilers and everything connected therewith . $

$

AS PER FORM ATTACHED DOLLARS.

TOUCHING the Adventures and Perils which we, the said Insurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation Condition or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said ship, &c., or any part thereof; and in case of any Loss or Misfortune it shall be lawful to the Insured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said ship, &c., or any part thereof, without prejudice to this Insurance to the charges whereof the said Insurance Company will contribute according to the Rate and Quantity of the sum herein insured. And it is specially declared and agreed that no acts of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandoment; having been paid the consideration for this Insurance by the Insured, or his or their Assigns, at and after the rate of 2.208 - - - per cent.

SUM INSURED
$17,500.-

Quantity of the sum herein insured. And it is specially declared and agreed that no acts of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandoment; having been paid the consideration for this Insurance by the Insured, or his or their Assigns, at and after the rate of 2.208 - - - per cent.

SUM INSURED
$17,500.-

RATE PER CENT
2.208%

PREMIUM
$386.40

Subject to the printed clauses and warranties as attached.

If there be an Agent of the INSURERS located at or near any place where repairs are made, or proofs of loss or average taken, said Agent must be represented on the surveys, if any be held, and all bills for repairs, or proofs of loss or average, must be certified by him, or they will not be allowed by this Company.

In Witness Whereof, the President of the said The National Union Fire Insurance Company, of Pittsburg, Pennsylvania, hath hereunto subscribed his name and caused the same to be attested by its Secretary, but this Policy shall not be valid unless countersigned by an officer or duly authorized Agent of this Company.

D. B. Hanna
Marine Secretary.

J. M. Hanna
President.

Countersigned at New Orleans, La. 19-60 this 1st day of July, 1937

E. T. BARRY & CO., INC., GENERAL AGENTS

By E. T. Barry
President - Resident Secretary

Civ. #66 Ad No 452

9280

FILED

SEP 22 1939

Stock Company

HULL POLICY

(Broad Form)

Expires July 1st, 1937

Property New Steel Oil Barge "TEXAS NO.2"

Amount - - - - - $17,500.-

Premium - - - - - $386.40 115 501.40

E. EGGERS

No. I.M.H. 450678

NATIONAL UNION

FIRE INSURANCE CO.

Pittsburgh, Pa.

T. C. STROTER & CO.

INSURANCE

COTTON EXCHANGE BUILDING

HOUSTON, TEXAS

Filed 22 day of Aug 19 39

L. C. MASTERSON, Clerk

By M. Masterson Deputy

It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.

OFFICERS

JOHN S. FISHER - - Chairman of Board
J. M. THOMAS - - - President
HENRY A. YATES - - Vice-President
PAUL MELLON - - - Vice-President
F. J. BREEN - - - - Secretary
D. S. HANNA - - Marine Secretary
A. W. McELDOWNEY - - Treasurer
WM. FINGERHUTH - Asst. Secretary
KENNETH F. MAY - - Asst. Secretary
W. A. STROUSS - - Asst. Treasurer

DIRECTORS

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E. E. COLE, Pittsburgh.
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WM. B. SCHILLER, Pittsburgh.
EDWIN W. SMITH, Reed, Smith, Shaw & McClay, Attorneys.
J. M. THOMAS, President.
HENRY A. YATES, Vice-President.

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 365.

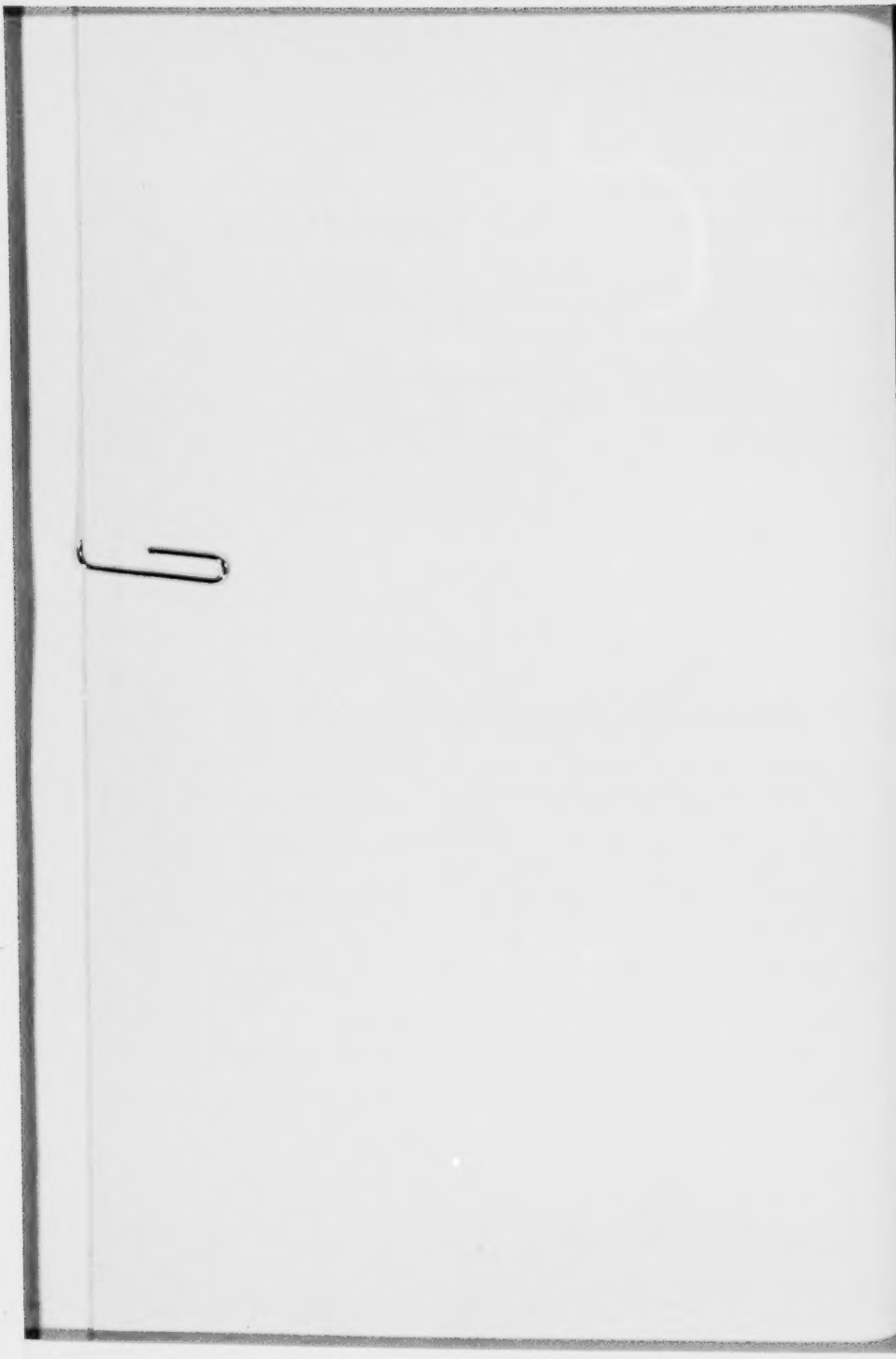
NATIONAL UNION FIRE INSURANCE COMPANY,
PETITIONER,

VS.

E. EGGERS, INDIVIDUALLY AND AS CLAIMANT OF
THE TUG FANNY D AND BARGE TEXAS
No. 2, RESPONDENT.

MEMORANDUM OF RESPONDENT, E. EGGERS, OPPOSING PETITION FOR CERTIORARI.

T. G. SCHIRMEYER,
E. A. KELLY,
Proctors for Respondent.



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MEMORANDUM OF E. EGGERS, OPPOSING PETITION FOR CERTIORARI.

It has often been said by this court that the jurisdiction to issue writs of certiorari is "to be exercised sparingly and only in cases of peculiar gravity and general importance or in order to secure uniformity of decision." *Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, at 259. None of these considerations apply to the case at bar.

Supplemental Facts.

The Underwriter's petition does not mention a pertinent typewritten clause attached to the policy in question to wit:

> "It is understood and agreed that no right of subrogation shall exist against any vessel owned in whole or in part or chartered by the assured on a bareboat basis."

The petitioning Underwriter by filing an appearance solely and exclusively in behalf of their Assured's Barge TEXAS No. 2 forced their assured to file an appearance and a claim in behalf of himself and his tug FANNY D. Thus by procedural strategy the Underwriter sought to divide their client into three separate legal entities in an attempt to avoid liability under the policy in question. The Underwriters in effect took constructive subrogation rights against their assured contrary to the subrogation clause set out above. Query, if the Assured cannot sue himself how can the Underwriters acquire this right?

The Issue.

The petitioning Underwriter seeks to secure a strained and narrow judicial interpretation of the plain and direct language of the "Full Collision Clause" in a marine insurance policy. This clause has been used in marine policies for over 100 years and the broad, liberal interpretation placed on this clause by the House of Lords in *The NIOBE*, App. Cas. 1891, 401, has not been disturbed or even questioned until the petitioning Underwriter refused to indemnify their Assured for collision damages inflicted by an inert barge which they insured.

The precise issue presented to this court is whether the language in the "Full Collision Clause" not only requires the insured vessel to *come* into collision with a third vessel but also requires the insured vessel to be the sole *cause* of the collision. By paraphrasing the "Full

Collision Clause" so as to fit the facts set out in the Underwriter's petition we find that there is no intimation in the terms of the policy that the Assured's vessel must *cause* a collision. Therefore, it is obvious that no question of peculiar gravity has been raised by the petitioner, on the contrary, we find that the issue resolves itself into an elementary question of interpreting plain English. The paraphrased clause reads as follows:

> "* * * if the barge TEXAS No. 2 shall come into collision with the S. S. CITY OF HOUSTON and Eggers, the Assured, in consequence thereof shall become liable to pay Southern Steamship Company then the National Union Fire Insurance Company will pay Eggers * * *."

The Senior Judge of the Fifth Circuit construed the "Full Collision Clause" in accordance with the principles of law established by this court and in a very able opinion made the following statement:

> "In construing the policy we will endeavor to go no further than is required by the facts in this case. Briefly stated, the condition of the policy under the full collision clause was that if the insured vessel collided with another ship, causing damage to her for which the assured was held liable, the underwriter would reimburse him for what he would pay, in the proportion fixed by the policy. To give the policy the interpretation contended for by the insurance company we would have to read into the full collision clause 'provided the insured vessel is herself at fault,' or words to that effect. Insurance policies that are vague or ambiguous are to be construed against the underwriters. If it had been the intention of the parties to restrict the coverage of the policy to cases in which the insured vessel was herself at fault it would have been very easy to have written it in instead of leaving it to be inferred by a strained construction. Eggers, the 'assured,' was the beneficiary and not the barge. We construe the policy to be broad enough to cover personal liability of Eggers resulting from the

collision, regardless of whether the barge could be held responsible *in rem*.

"In this case, whether the barge was a passive instrument or to be considered together with the tug as in law one ship, the negligence that caused the collision was the faulty navigation of the two by Eggers. He could not limit his personal liability for the accident by surrendering either the tug or barge or both. *Liverpool & G. W. Steam. Co.* v. *Phenix Ins. Co.*, 129 U. S. 397; *Sabine Towing Co.* v. *Brennan*, 72 F. 2d 490. When the barge came into collision with the ship Eggers became liable personally to pay damages suffered by the ship caused by that collision. If he pays the damages he will be entitled to indemnity under the hull policy."

The Law.

The petitioning Underwriter erroneously stated that the decision of the Fifth Circuit overturns the universally accepted interpretation of the clause in question. The interpretation of this clause was established in 1891 by the House of Lords in a decision which construed the "Full Collision Clause" in reference to a combination of tug and tow. The case referred to is The NIOBE, *McCowan* v. *Baine et al.*, App. Cas. 1891, 401. This case has not been challenged by any court in the world except perhaps the opinion of the Appellate Court of Cuyahoga County, Ohio, which case was not even published in the Ohio State reports and is devoid of citations or legal authorities. In deference to the Cuyahoga County Appellate Court, we must assume that The NIOBE case was not brought to that court's attention.

The NIOBE case is an appeal to the House of Lords from a judgment of the Court of Sessions in Scotland, which court had affirmed a judgment of the Lord Ordinary. The facts are copied verbatim.

"The respondents, the owners of the NIOBE, had effected a policy of marine insurance with the appel-

lant, an underwriter. The policy contained the following clause, making the underwriters liable:

> 'If the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall, in consequence thereof, become liable to pay to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money, not exceeding the value of the ship hereby assured.'

"Whilst the NIOBE was on her way to Cardiff in tow of the FLYING SERPENT, her tug came into collision with the VALETTA, causing her serious damage, so that she afterwards sank. The VALETTA, after colliding with the tug, also came into contact with the NIOBE, but without receiving any further injury. In a suit before the Admiralty Court of England it was decided by Lord Hannen that the collision was due to the fault of the tug, which admitted liability, in not porting her helm in terms of the regulations, and that the NIOBE was likewise to blame in respect of her failure to keep a lookout and to control and give proper orders to her tug (*The NIOBE*, 59 L. T. Rep. N. S. 257; 6 Asp. Mar. Law Cas. 300, 13 P. Div. 55). The respondents had in consequence paid 12,909 pounds to the owners of the VALETTA, and they now sued one of the underwriters of the policy for his proportion of the sum, which they claimed by way of indemnity. The action was heard by Lord Trayner, and judgment was given for the owners of the NIOBE, which was affirmed by the Second Division of the Court of Session. The underwriter appealed on the ground that, as no actual collision occurred between the NIOBE and the VALETTA, he was not liable.

"The Earl of Selborne—My Lords: I cannot help thinking that, in construing such a mercantile contract as this, there is as much danger of error in extreme literalism as in too much latitude; and though I do not adopt the argument that a contract of indemnity against the consequences of collision can be extended to a case in which there has been no col-

lision, but only damages caused by measures properly taken to avoid a collision, *I think a construction which makes it cover all damages consequent upon an actual collision, for which the assured is liable, is more reasonable and more in accordance with the probable intention of the parties, if the words will bear it, than one which does not.* * * * If a ship cannot be said to 'come into collision with any other ship' except by direct contact, causing damage between the two hulls, including under the term hull all parts of a ship's structure, there was in this case no such contact, and the appellants ought to succeed. But I cannot adopt so narrow a construction of those words. I should hold them to extend to cases in which the injury was cauesd by the impact, not only of the hull of the ship insured, but of her boats or steam launch, even if those accessories were not (as in this case) insured, as being, in effect, parts of the ship. I should also hold them to cover an indirect collision, through the impact of the ship insured upon another vessel or thing capable of doing damage, which might by such impact be driven against the ship suffering damage. I should take the same view, as against insurers in similar terms, of a tug towing one or more barges (in which case the barge owners would not be liable for a collision) if damages to any vessel were caused by the barge or barges being driven against it through the improper navigation of the tug, although there might have been no impact of the tug itself upon the injured vessel. And, after full consideration it seems to me to be no more than a reasonable extension of the same principles to include within them such a case as the present."

The decisive language in the NIOBE case established a uniform construction of the "Full Collision Clause." It is, therefore, reasonable to assume that all marine Underwriters familiar with the general marine insurance laws must have been aware of the liberal construction placed on this clause and that a restricted and narrow construction of the "Full Collision Clause" could not be had unless the wording of the clause was changed.

It is significant that the wording of the "Full Collision Clause" was not changed after the House of Lords construed this clause in 1891. This should have considerable bearing upon the disposition of the petition now before the court, particularly in view of the fact that this court looks toward the laws of England for guidance in matters of marine insurance. *Queen Insurance Company* v. *Globe Insurance Company,* 263 U. S. 487.

There are only two Federal decisions involving the "Full Collision Clause" in a case where a tug and a tow are involved. Although the facts in these cases vary from the facts in the case at bar, nevertheless, the scope of the collision coverage in question is discussed. Both these cases stress the fact that the insured vessel must *come* into collision with a third vessel and the question of *cause* or *fault* was not even mentioned. There is no conflict in these decisions with the Circuit Court decision in the case at bar. In *Western Transit Company* v. *Brown,* (2 C. C. A., 1908) 161 Fed. 865, the steamer TROY's propeller wash caused the WILBUR to sheer and collide with the MARTHA. The court held the TROY and WILBUR at fault. The owner of the TROY sued the Underwriters for indemnity under the "Full Collision Clause." The court said:

> "We think the language of the clause means that the vessel of the assured shall herself come in contact with the injured vessel and as the TROY did not come in contact with the MARTHA the owners of the TROY cannot recover from the Underwriters for the liability."

In *Coastwise S. S. Co.* v. *Aetna Ins. Co. et al.,* (S. D. N. Y., 1908) 161 Fed. 871, the owners of the tug RICHMOND brought an action against the Underwriters for indemnity on a Hull Policy covering the tug RICHMOND. This policy contained the same "Full Collision Clause." The tug had the barge GEORGIAN in tow and the barge contacted the yacht ELSA. The tug was found

to be solely at fault. The court held that the owners of the tug could not recover on the tug policy because the uninsured barge and not the tug "came" into collision with the yacht. Citing the *Western Transit Case* (*supra*).

Thus the uniform rule has been established by the Federal Courts in the United States that the insured vessel must actually come into contact with a third vessel and the question of fault was of no concern. The English Courts went a step further and held that the Underwriters are liable even though the insured tug did not actually come in contact with a third vessel. The basis of this decision rests upon the principle of maritime law that in construing a maritime contract the tug and tow must be considered as one vessel. This rule established by the House of Lords in the NIOBE case was subsequently adopted by this court in a case involving the construction of a statute. The following quotation taken from *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326 (1927), establishes the unity doctrine in cases where the tug and tow are owned and operated in common:

> "This court and other federal courts repeatedly have held that such a combination constitutes, in law, one vessel. See *NORTHERN BELLE*, 76 U. S. 526, 528-529; *CIVILTA AND RESTLESS*, 103 U. S. 699, 701; *NETTIE QUILL*, 124 Fed. 667, 670; *COLUMBIA*, 73 Fed. 226; *SEVEN BELLS*, 241 Fed. 43, 45; *FRED W. CHASE*, 31 Fed. 91, 95; *BORDENTOWN*, 40 Fed. 682, 687; *State* v. *Turner*, 34 Ore. 173, 175-176."

The following quotation from *THE COLUMBIA*, 73 Fed. 226, was approved by this court:

> "When the tug made fast and took the barge in tow, to perform the contract of carriage, the two became one vessel for the purpose of that voyage, as much so as if she had been taken bodily on board the barge, instead of being made fast thereto by means of lines." Citing *THE NORTHERN BELLE* (*supra*).

If a tug and a barge owned and operated in common are in law one vessel then the petitioner's argument concerning the fault of the tug is without foundation because it is impossible to separate the fault of either tug or barge if the two vessels are a unit.

In *General Mutual Insurance Company* v. *Sherwood*, 14 How. 351, 362, 14 L. Ed., at 152, this court recommended a practical interpretation of marine insurance contracts because they are an "obscure, incoherent and very strange instrument" and generally "more informal than any other brought into a court of justice." Justice Curtis further remarked that constant reference has been made to the usage of merchants and commercial people and that marine insurance law "has been kept a practical and convenient system, by avoiding subtle and refined reasoning, however logical it may seem to be and looking for safe practical rules."

In *Columbian Insurance Company* v. *Catlett*, 12 Wheat. 383, 6 L. Ed. 661, this court stated the following rule of construction as applied to a marine insurance policy, "the instrument is somewhat loose in its form and has always received a liberal construction with reference to the nature of the voyage and intent of the parties."

Fireman's Fund Insurance Company v. *Globe Navigation Company*, 236 Fed. 618, at 633, Cert. Den. ..... U. S. ..... The Court said:

> "* * * where the insurer has used terms in the policy that leaves it a matter of doubt as to the true construction to be given the language, the court should lean against the construction which would limit the liability of the insurance company. *National Bank* v. *Insurance Co.*, 95 U. S. 673, 678. *London Assurance Co.* v. *Companhia De Moagens*, 167 U. S. 149, 159, 17 S. Ct. 785, 42 L. Ed. 113; *Thames & Mersey* v. *Pacific Creosoting Co.*, 223 Fed. 561, 567, 139 C. C. A. 101. In other words, if the policy will fairly admit of two constructions, the one should be adopted

which will indemnify the insured. *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 282, 3 S. Ct. 207, 27 L. Ed. 392; *Traveler's Ins. Co.* v. *McConkey*, 127 U. S. 661, 666, 8 S. Ct. 1360, 32 L. Ed. 308; *Burkheiser* v. *Mutual Accident Ass'n*, 61 Fed. 816, 818, 10 C. C. A. 94, 26 L. R. A. 112."

The respondent submits that the opinion of the Fifth Circuit Court reflects the above established rules pertaining to the construction of marine insurance contracts and that there is no lack of uniformity of decision pertaining to the issue now before this court.

Conclusion.

Not only is the law governing the case at bar clear and uniform, but the respondent also submits that the question involved in this case is not of peculiar gravity or general importance. The Respondent agrees with the statement found in the Underwriter's petition for rehearing (R. 104) to the effect that the chance of obtaining certiorari in a case of this character is not good and that the petitioner's only hope for avoiding liability under the terms of the policy in question rested with the Fifth Circuit Court of Appeals. In event there is any doubt as to whether this court shall issue a writ of certiorari then the court's attention is directed to the respondent's reply brief to the Underwriter's petition for rehearing filed in the court below (R. 106 to 113) wherein the petitioner's arguments are answered and discussed as well as the arguments presented by various other Underwriters in a brief filed *amici curiae*.

The respondent submits that the petition for certiorari should be denied.

Respectfully submitted,

T. G. SCHIRMEYER,
E. A. KELLY,
Proctors for Respondent.